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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. FRANK GEORGE TISBY, Defendant and Appellant.	G046862 (Super. Ct. No. 09WF2281) O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Frank F. Fasel, Judge. (Retired judge of the Orange Super. Ct. assigned by the Chief Justice pursuant to art. VI, § 6 of the Cal. Const.) Affirmed in part, reversed in part and modified.

Joanna Rehm, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, A. Natasha Cortina and Kimberly A. Donohue, Deputy Attorneys General, for Plaintiff and Respondent.

After a jury convicted appellant Frank George Tisby of first degree burglary, the trial court sentenced him to the upper term of six years for that offense, plus a 10-year enhancement for committing a violent felony for the benefit of a criminal street gang. Appellant contends the enhancement must be reduced to five years because the prosecution did not allege that a person other than an accomplice was present during the burglary. We agree. Although we reject appellant's secondary contention that his attorney was ineffective for failing to prevent imposition of the upper term, we will modify the judgment to reflect a sentence of five years for the gang enhancement and to adjust appellant's presentence credits accordingly. In all other respects, we affirm.

FACTS

Sidelined by a cold, Steven Truax stayed home from work on August 11, 2009. At about noon, he awoke to find an intruder, appellant, inside his home. Appellant was holding a bag or stocking, and when Truax told him to get out of his house, he darted out the front door. Truax chased him to the driveway, at which time a second man, Roger Shackleford, ran past him. Shackleford and appellant then hopped into an awaiting car and fled the scene. When Truax went back inside his house, he found a pillowcase on the floor which contained his roommate's computer, watch and other valuables.

A week later, the police stopped a car in which appellant, Shackleford and Shackleford's brother Rodney were riding. Investigators determined the car had been rented from Midway Car Rental by Erica Jones, who has two children by Rodney. They also learned the car used in the Truax burglary had been rented from Midway by Jones.

At the time of the burglary, appellant and the Shackleford brothers were members of the Rollin' 30's gang. A gang expert testified the facts of this case were consistent with other burglaries the gang had committed. He also opined the burglary was committed for the benefit of the Rollin' 30's.

The jury agreed. It not only convicted appellant of first degree burglary and active participation in a criminal street gang (Pen. Code, §§ 459, 460 & 186.22, subd.

(a))[1], it also found true the enhancement allegation the burglary was committed for the benefit of, in association with, and in furtherance of, the Rollin' 30's gang. (§ 186.22, subd. (b).)

At sentencing, the court gave appellant the upper term of six years for the burglary and stayed his sentence for gang participation. It then turned to section 186.22, subdivision (b) to ascertain appellant's sentence on the gang enhancement. That section calls for an enhanced sentence of five years when the underlying crime is a serious felony, such as first degree burglary. (§ 186.22, subd. (b)(1)(B).) But if the underlying felony "is a violent felony, as defined in subdivision (c) of Section 667.5, the person shall be punished by an additional term of 10 years." (§ 186.22, subd. (b)(1)(C).)

The list of violent felonies in section 667.5, subdivision (c) includes "[a]ny burglary of the first degree, as defined in subdivision (a) of Section 460, wherein it is *charged and proved* that another person, other than an accomplice, was present in the residence during the commission of the burglary." (§ 667.5, subd. (c)(21), italics added.) Defense counsel argued that, although appellant was convicted of first degree burglary, the crime was not a violent felony because the information did not allege another person other than an accomplice was present during its commission. Defense counsel argued it would violate due process to impose the 10-year enhancement under those circumstances. However, the court disagreed and gave appellant the full 10 years on the enhancement, bringing his total term of imprisonment to 16 years.

I

The first issue is the propriety of the 10-year enhancement. As noted, section 667.5, subdivision (c)(21) provides that first degree burglary is violent felony for sentencing purposes when it is "charged and proved" that another person other than an accomplice was present in the residence during the burglary. Since it was clearly proven

[1] All further statutory references are to the Penal Code.

a nonaccomplice, Truax, was present during the burglary, we must focus on whether the prosecution alleged as much in charging appellant with that offense.

The information alleged, "On or about August 11, 2009, in violation of Sections 459-460(a) of the Penal Code (FIRST DEGREE RESIDENTIAL BURGLARY), a FELONY, FRANK GEORGE TISBY AND ROGER NEAL SHACKLEFORD did unlawfully enter an inhabited dwelling house, trailer coach, and inhabited portion of a building, inhabited by Truax, with the intent to commit larceny."

The Attorney General claims that, reasonably understood, this language — particularly the phrase "inhabited by Truax"— provided notice the prosecution was alleging Truax was present during the burglary, so as to elevate the burglary from a serious to a violent offense for purposes of the gang enhancement. However, regarding the crime of burglary, "'inhabited' means currently being used for dwelling purposes, *whether occupied or not*." (§ 459, italics added.) Thus, alleging Truax "inhabited" the building appellant burglarized did not necessarily import Truax was "present" in the building during the burglary, which is what section 667.5, subdivision (c)(21) requires to be charged.

That may sound hypertechnical, but the California Supreme Court has been very strict in terms of interpreting the "pled and proved" requirement of criminal statutes. For example, in *People v. Mancebo* (2002) 27 Cal.4th 735 (*Mancebo*), the court determined it was improper to use the multiple victim circumstance in the One Strike law where that circumstance was not specifically alleged in the prosecution's charging documents. The substantive counts of the information clearly indicated the defendant was being charged with victimizing multiple children, the evidence at trial showed as much, and there was really no way to defend against the multiple victim circumstance had it been pled. However, none of that mattered to the *Mancebo* court because the One Strike law explicitly requires all relevant circumstances to be "pled and proved" and "alleged in the accusatory pleading" before they can be used to increase the defendant's

sentence. (*Id*. at pp. 741-742, fn. 4, quoting § 667.61, subds. (f) & (i).) Despite the presence of a factual basis for the multiple victim circumstance, *Mancebo* forbade its use against the defendant in that case because "no factual allegation in the information or pleading in the statutory language informed [him] that if he was convicted of the underlying charged offenses, the court would consider his multiple convictions as a basis for One Strike sentencing . . . ." (*Mancebo, supra*, 27 Cal.4th at p. 745.)

Likewise here, appellant was never apprised in the charging documents that if convicted of the burglary charge, the court would consider the fact Truax was present during the burglary as justification for increasing his sentence on the gang enhancement from five years to ten years. Indeed, the prosecution did not even bring up the issue until after appellant was convicted and he was being sentenced by the court. That undermined appellant's right to notice of the severity of the charges he was facing.

In fairness to the prosecutor, it does not appear he was trying to sandbag the defense by failing to bring up the issue sooner. Rather, he simply believed the wording of the information was good enough to satisfy due process. However, the information actually provided appellant with less notice than the information that was found lacking in *Mancebo*. Whereas the information in *Mancebo* at least provided a factual basis for the sentence enhancement at issue in that case, here, as explained above, the information did not even supply that minimal information. More importantly, the information failed to apprise appellant the prosecution intended to use the nonpleaded fact of Truax's presence in the residence to double the enhancement on the gang allegation from five to ten years.

Surely, this would have been useful for appellant to know before trial. The record indicates he was offered a four-year plea bargain before trial, and that offer naturally would have had even greater attraction had appellant known he was facing a decade behind bars just on the gang enhancement. Other factors were surely at play in the negotiation process, and we have no way of knowing if the failure to plead the

burglary as a violent felony would have affected plea negotiations in this particular case. However, as our Supreme Court recognized in *Mancebo*, "in many instances a defendant's decision whether to plea bargain or go to trial will turn on the extent of his exposure to a lengthy prison term." (*Mancebo, supra*, 27 Cal.4th at p. 752.) For that reason alone, it is important for prosecutors to strictly adhere to the pleading requirement set forth in section 667.5, subdivision (c)(21).

The Attorney General correctly notes that in reaching its decision in *Mancebo*, the California Supreme Court limited its holding to the One Strike law. (*Mancebo, supra*, 27 Cal.4th at p. 745, fn. 5.) However, the court's analysis was informed by cases that involved analogous statutes that contain "pled and proved" requirements, including the statute at issue here, section 667.5. (*Mancebo, supra*, 27 Cal.4th at pp. 745-746, discussing *People v. Haskin* (1992) 4 Cal.App.4th 1434.)

Moreover, *Mancebo* makes clear that "in addition to the statutory requirements that enhancement provisions be pleaded and proven, a defendant has a cognizable due process right to fair notice of the specific enhancement allegations that will be invoked to increase punishment for his crimes." (*Mancebo, supra*, 27 Cal.4th at p. 747.) If, as here, such notice is not afforded, the resulting sentence is legally unauthorized and harmless error analysis does not apply. (*People v. Hernandez* (1988) 46 Cal.3d 194, 208-209, discussed with approval in *Mancebo* at pp. 746-747, 749.) Therefore, we reverse appellant's 10-year sentence on the gang enhancement and order the imposition of a 5-year sentence in its stead.

In addition, because appellant was not charged and convicted of a violent offense, he is not subject to the 15 percent conduct credit limitation set forth in section 2933.1. Rather he is entitled to receive "two days of conduct credit for each four-day block of time served." (*People v. Kimbell* (2008) 168 Cal.App.4th 904, 908.) Therefore, based on the fact appellant spent 761 days in custody before sentencing, we will modify his conduct credit from 114 days to 380 days, for a total credit award of 1,141 days.

II

Appellant also contends his attorney did not do enough in terms of challenging imposition of the upper term on the burglary count. He argues it is reasonably probable he would have received a more favorable term had his attorney been more diligent. We do not agree.

As reflected in the probation report, defense counsel sent a letter to the probation officer before sentencing in which she emphasized appellant's lack of prior criminal record and extolled his desire to accept responsibility at an early stage of the proceedings. She also claimed appellant had learned his lesson from the case and would act more responsibly in the future if he were given another chance.

But the record shows appellant was given another chance following his arrest in this case. While out on bail, he was arrested for being involved in a residential burglary that occurred in Torrance in April 2010. According to the records in that case, appellant was apprehended for driving the getaway car, and when the police pulled him over, he had a pillowcase full of loot and a police scanner in his vehicle.[2]

Moreover, appellant sustained eight rule violations, two "major" and six "minor," while he was in custody awaiting trial in the present case. And he tried to downplay his gang ties and his role in the case when speaking with the probation officer. Appellant argues there was no evidence he was involved in planning the Truax robbery, but he is the one Truax encountered inside his home. Mastermind or not, he is the one who breached the sanctity of the Truax residence and arguably posed the greatest danger to him.

Appellant complains the probation report did not include any information that was favorable to him. However, the report includes numerous letters of recommendation that were submitted on appellant's behalf from his friends and family.

[2] Appellant also was arrested for possessing burglary tools in 2009, although that charge was ultimately dismissed.

And the report states, "The 24-year-old defendant has no prior record of criminal conduct" and he "has expressed a willingness to comply with the terms of probation." These factors were not formally described as "mitigating factors" in the probation report. But since the trial judge stated he had read the report, it is logical to presume he took them into consideration when sentencing appellant.

Appellant asserts Truax's presence at the time of the burglary was an element of the offense and thus should not be viewed as an aggravating factor for purposes of sentencing. However, as we explained above in section I, habitation, as opposed to victim presence, is the key requirement for residential burglary. The fact Truax happened to be home at the time of the burglary makes this case more serious than other first degree burglaries where the victim inhabits – but is away from – his property, at the time of the offense.

Admittedly, the trial court did not articulate any reasons for imposing the upper term on the burglary, nor did defense counsel request any reasons or otherwise object to the court's decision in this regard. Yet, in light of all the relevant considerations, we do not believe it is reasonably probable appellant would have received a more favorable sentence on the burglary count had his attorney handled the matter any differently. Therefore, counsel was not ineffective for failing to achieve a better result. (*People v. Riel* (2000) 22 Cal.4th 1153, 1175 [to prove ineffective assistance of counsel defendant must show deficient performance *and* prejudice, meaning it is reasonably probable he would have received a more favorable result but for counsel's alleged failings].)

DISPOSITION

The judgment is reversed with respect to appellant's 10-year sentence on the gang enhancement, which is modified to a term of 5 years in prison. In addition, appellant's presentence conduct credits are modified from 114 to 380 days, resulting in a total credit award of 1,141 days. The clerk of the trial court is directed to prepare an

amended abstract of judgment reflecting these modifications and forward a certified copy to the Department of Corrections and Rehabilitation. In all other respects, the judgment is affirmed.

BEDSWORTH, ACTING P. J.

WE CONCUR:

FYBEL, J.

IKOLA, J.